

# A Libyan Playground for Foreign Powers: Presenting the Case for 'Negative Equality'



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## Prematurely calling time of death on 'negative equality'?

On 5 and 6 December 2019, the Journal on the Use of Force and International Law (JUFIL) and the Ghent Rolin-Jaequemyns International Law Institute (GRILI) hosted an international [conference](#) on 'military assistance on request', the doctrine formerly known as 'intervention by invitation'. Also present at the conference were several members of the refurbished International Law Association (ILA) [Committee on the Use of Force](#), co-chaired by Professors Claus Kreß and Vera Rusinova and intent on fleshing out the many unresolved issues related to this intricate topic.

One *leitmotif* of the spirited conference proceedings (with resultant papers soon to be published in two special issues of JUFIL) was profound scepticism towards the doctrine of 'negative equality', which [prescribes](#) that '[t]hird States shall refrain from

giving assistance to parties to a civil war which is being fought in the territory of another State'. Few participants considered the doctrine as a representation of the *lex lata*, echoing common criticism among legal commentators – including in the blogosphere (see, for example, [here](#), [here](#) and [here](#)). In a 2018 [report](#), the ILA Committee's immediate predecessor also seems to have hedged its bets by opining that while 'consent can allow for the sending of armed forces into a State following the request by its government for assistance in quelling an insurrection ... [and] may preclude a violation of the *jus ad bellum*, it cannot justify violations of the *jus in bello* or international human rights law'.

It is therefore all the more surprising that the situation in Libya appears to belie this negative trend for 'negative equality' as it features a ban on all foreign interference and emphatic support for a Libyan-led, Libyan-owned process to end the conflict – and thereby confirms the doctrine's main tenets.

## Foreign intervention floods Libya

Arab Spring protests in 2011 against the dictatorial rule of long-time Libyan strongman Colonel Muammar Qadhafi set in motion [a series of events](#), including a [UN-sanctioned](#) military intervention, that plunged the country in a deep crisis that continues to this day. The uprising devolved into a fully-fledged civil war by May [2014](#) and (re-)intensified in April [2019](#), pitting the forces of General Khalifa Haftar – at the head of the so-called Libyan National Army (LNA) and backed by the eastern-based House of Representatives (HoR) – against those loyal to the [UN-recognized](#), Tripoli-based Government of National Accord (GNA) led by Fayez al-Sarraj.

While military support has been flowing to the various factions in Libya from the [get-go](#), notwithstanding an [arms embargo](#) imposed by the UN Security Council since 2011, *overt* foreign intervention escalated with the surprise signature of two Memorandums of Understanding (MoUs) between the GNA and Turkey in November 2019. One of them pertained to [military and security cooperation](#), and was (also) relied upon by the Turkish government for [sending](#) at least one hundred military officers and thousands of Syrian fighters from a Turkish-backed rebel group to Libya, assisted by effective air support and deliveries of weapons and other military equipment. Over the course of six months, the Turks tipped the scales squarely in favour of the GNA – with a battle currently looming over the strategic coastal city of Sirte.

Haftar's [foreign backers](#) – including Egypt, the United Arab Emirates, Russia and France – were left [scrambling](#) to formulate a firm response. That response came on Saturday 20 June, when Egyptian President Abdel Fattah El Sisi boldly declared Sirte and the inland al Jufra air base a [red line](#), the crossing of which would trigger a direct military (counter-)intervention. In the meantime, the Arab League has [called for an immediate ceasefire](#), but also warned against a 'continuation of military action

for an immediate ceasefire, but also warned against a 'continuation of military action that alters existing front lines'.

## International justification and reaction

Following the unfortunate pattern evident in similar recent cases (such as those in [Yemen](#), [Syria/Iraq](#) and [Mali](#)), the States (considering) overtly intervening in the armed conflict by sending troops under its command did not provide a clear and determinate legal justification for such action, but rather offered a range of possible mandates.

For example, Turkey relied on the aforementioned MoU (despite its terms not seeming to apply), a GNA-issued request for assistance in line with UNSC Resolution 2259 (even though neither trump the arms embargo still in place), prior foreign support to the 'putschist' Haftar, the fight against international terrorism, protection against illegal immigration and human trafficking, as well as the protection of Turkish national interests (see [here](#), [here](#), [here](#) and [here](#)). Admittedly, Turkish President Recep Tayyip Erdoğan also [noted](#) he wanted the 'legitimate government in Libya to remain standing', clearly signalling a desire to determine the outcome of the conflict.

Similarly, Egypt defended its envisioned military intervention as having [international legitimacy](#) 'either within the framework of the UN Charter (Right to self-defense), or according to the only Libyan elected legitimate authority' (a reference to the HoR). At the same time, the intervention would aim at '[p]rotecting and securing the western borders of the State ... from the threats of terrorist militias and mercenaries' and 'restoring security and stability in Libya as part and parcel of Egypt's security and stability'.

At first sight, both States thus rely on an invitation from their favoured governing body in Libya – albeit as only one justification among many – which ostensibly flies in the face of a prohibition on military assistance to *any* party embroiled in a fully-fledged civil war (as prescribed by 'negative equality'). However, that image shifts rather dramatically when considering the reaction of the broader community of States.

Indeed, on 19 January 2020 all primary actors involved in the Libyan conflict – including the major foreign backers of both parties, the permanent members of the UN Security Council, the Arab League, African Union and European Union – accepted the so-called [Berlin Conference Conclusions](#). Four such conclusions committed the signatories to accept that '[o]nly a Libyan-led and Libyan owned political process can end the conflict and bring lasting peace', to refrain from 'interference in the armed conflict' and 'the financing of military capabilities or the recruitment of mercenaries' and to 'fully respect and implement the arms embargo'.



The UN Security Council then endorsed these conclusions, equally underscoring the importance of facilitating a Libyan-led and Libyan-owned inclusive political process and explicitly *demanding* that all States refrain from intervening in the conflict and comply with the arms embargo ([UNSC Res 2510](#), preambular para 3, paras 2 and 11; see also [UNSC Res 2509](#)). This led the Libyan representative in the ensuing [debate](#) to exclaim:

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We welcome the confirmation by the Council that the only solution to the Libyan crisis is a political one. ... we hope to work together in order to bring our views closer together and overcome any differences, with a view to achieving full consensus as we saw at the Berlin Conference. That would free Libyans from the international restrictions, leading to *self-determination*. As we hear every single day, the solution should be a [sic] *Libyan-led and Libyan-owned*. (emphasis added)

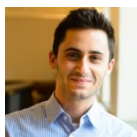
Consequently, the official message by the international community of States (confirmed [time](#) and [again](#)) on the situation in Libya was clear: States must refrain from interfering (militarily) in the conflict on *either side* and let the Libyan people *themselves* determine the way out of the crisis and into a new political future. Regardless of whether this message was heeded in practice, it is as clear a confirmation of 'negative equality' as one could imagine.

## Concluding thoughts

This post did not intend to take up the defence of 'negative equality' on political or policy-oriented grounds, even if [research](#) tends to show that foreign interference prolongs internal armed conflicts with particularly devastating effects on the civilian population. Rather, it proceeds from the legal understanding that certain armed conflicts may be viewed as the forcible implementation of a people's internal right of [self-determination](#), triggering a [ban](#) on all third-party interference that is not strictly humanitarian and/or sanctioned by the UN.

While none of that is admittedly borne out by contemporary *practice* in Libya, it does find surprisingly broad support in official statements related to the conflict thereby laying bare the hypocrisy of intervening States as well as the UN Security Council's unfortunate inability to ensure compliance with its arms embargo. As the legality of 'military assistance on request' is primarily determined by customary international law, States' *opinio juris* is crucial and, in this case, firmly contradicts the common refrain that a military intervention at the request of a sitting government is *prima facie* allowable even if to quash an internal insurrection. International lawyers should

thus call out Turkish and (threatened) Egyptian action for what it is: an unequivocal breach of international law.



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